

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
 . Detroit, Michigan
 . December 2, 2015
Debtor. . 1:37 p.m.

HEARING RE. MOTION FOR ENTRY OF AN ORDER (I) ENFORCING
THE PLAN OF ADJUSTMENT AND (II) REQUIRING THE WITHDRAWAL
WITH PREJUDICE OF THE AUGUST 2, 2013, GRIEVANCE FILED BY
THE SENIOR ACCOUNTANTS, ANALYSTS AND APPRAISERS ASSOCIATION
ON BEHALF OF CEDRIC COOK FILED BY DEBTOR IN POSSESSION
CITY OF DETROIT, MICHIGAN (DOCKET #10183)
BEFORE THE HONORABLE THOMAS J. TUCKER
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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1 THE CLERK: All rise. This court is now in session.
2 The Honorable Thomas J. Tucker is presiding. You may be
3 seated. The court calls the case of the City of Detroit,
4 Michigan, Case Number 13-53846.

5 THE COURT: All right. Good afternoon. Let's have
6 appearances for the record starting with the city.

7 MR. SWANSON: Thank you, your Honor. Marc Swanson
8 on behalf of the city.

9 MR. WASHINGTON: And, your Honor, my name is George
10 Washington on behalf of the Senior Accountants Association.

11 THE COURT: All right. Good afternoon. This is a
12 hearing, as you know, on the city's motion for entry of an
13 order enforcing plan of adjustment, et cetera. I did review
14 the city's motion brief, the response brief filed on behalf
15 of the Senior Accountants, Analysts and Appraisers
16 Association, and the City of Detroit's reply brief filed, the
17 most recent filing being last Wednesday, November 25. So,
18 Mr. Swanson, let's hear from you first, and then we'll hear
19 from Mr. Washington.

20 MR. SWANSON: Thank you, your Honor. The city
21 requests an order prohibiting Cook from pursuing a grievance
22 that was filed against the city for two reasons. First, your
23 Honor, Cook voted to accept the city's bankruptcy plan. The
24 ballot was attached as Exhibit 6-N to the city's motion. By
25 voting to accept the city's bankruptcy plan, Cook released

1 all claims against the city as of the effective date.

2 The SAAA, the union, raised two arguments in
3 response: first, said that Cook could not release his
4 claims. Your Honor, we don't believe that argument is
5 correct for several reasons. First, the grievance was filed
6 on behalf of Cook. It was signed by Mr. Cook. It's premised
7 entirely on Cook's alleged claims against the city, and it
8 requests that the city restore Cook's pay, make him whole,
9 and provide other remedies directly to Cook. In short, your
10 Honor, the claims alleged in the grievance and the relief
11 requested both fall within the scope of the release provision
12 in the plan and the definition of liabilities upon which that
13 release provision is based.

14 Second, your Honor, the union argues that the
15 contract was assumed and, as a result of that assumption,
16 Cook did not release his claims. Your Honor, that argument
17 fails immediately because the contract was not assumed. It
18 was not in effect, as the union stated in its brief, as of
19 the date of confirmation of the city's plan, and, thus, it
20 was not an executory contract and not assumed. Your Honor,
21 both of the arguments --

22 THE COURT: And it was not in effect because what?
23 It was superseded by a collective bargaining agreement?

24 MR. SWANSON: That's correct, your Honor, in July
25 2014. The plan was not confirmed for several months after

1 that.

2 THE COURT: Okay. Go ahead.

3 MR. SWANSON: Thanks. In short, your Honor, both of
4 the arguments fail. The Court should find that Cook released
5 the claims asserted in the grievance and any right to receive
6 anything from the city based on these claims. So we have one
7 argument based on the ballot and the release provision in the
8 plan, your Honor, and the second argument is a separate --

9 THE COURT: We have a rather unusual situation, I
10 suppose. Mr. Cook was sent a ballot, and he signed and sent
11 it in voting to accept the plan at a time when he had not
12 filed a proof of claim, and he never has filed a proof of
13 claim; right?

14 MR. SWANSON: That's correct, your Honor.

15 THE COURT: So was he even eligible to vote on the
16 plan?

17 MR. SWANSON: He held a pension claim, your Honor,
18 so he was eligible to vote on the plan.

19 THE COURT: Oh, I see. Pension. So was that the
20 idea of the ballot was a -- sent to the class of the pension
21 claim holders?

22 MR. SWANSON: I think it was Class 11, your Honor.
23 The top of the ballot states, "The undersigned, a retiree --
24 a retired GRS pension claim holder in Class 11, as of March
25 1, 2014, against the City of Detroit." So Mr. Cook had a

1 claim against the city, voted to accept the plan. The
2 release provision in the plan was not limited in any way to
3 any claims arising or relating to the pension. It was very
4 broad. It said all liabilities relating to the city, which
5 clearly would encompass these alleged liabilities.

6 Now, your Honor, the second argument that the city
7 made is that the claims were discharged under the discharge
8 provision of the plan.

9 THE COURT: Excuse me one second. I'm just going to
10 pull up on the screen here the ballot.

11 MR. SWANSON: Sure.

12 THE COURT: That's exhibit what of your motion?

13 MR. SWANSON: It's Exhibit 6-N, your Honor.

14 THE COURT: N. Okay. Hold on.

15 MR. SWANSON: Page 69 of 70 and 70 of 70 of the
16 motion.

17 THE COURT: All right. Thank you.

18 MR. SWANSON: Thank you. Your Honor, the second
19 argument that the city is making is that the claims were
20 discharged because they arose prior to the city's bankruptcy
21 filing date. Now, your Honor, the SAAA spent most of its
22 brief discussing when the claim accrued under state law. As
23 the city has consistently maintained before this Court, that
24 approach, called by -- or referred to by many courts as the
25 accrual approach, is not the proper approach for determining

1 when a claim arises in a bankruptcy case. The proper
2 approach for determining when a claim arises in a bankruptcy
3 case is the fair contemplation test, your Honor, and under
4 the fair contemplation test Cook's claim arose prior to the
5 petition date. The city --

6 THE COURT: Well, you've argued that that doesn't
7 even matter because it clearly arose before the effective
8 date, and that's all the --

9 MR. SWANSON: Oh, on the discharge?

10 THE COURT: Yeah.

11 MR. SWANSON: Yeah.

12 THE COURT: Is that right?

13 MR. SWANSON: I believe that's right, yes. I think
14 the city is not going to pursue the argument that if it arose
15 after the petition date but before the effective date the
16 claim was discharged. The city just would request that the
17 Court focus on whether the claim arose prior to the petition
18 date, not whether it arose -- if it arose after the effective
19 date, then, you know, the city would not maintain that it was
20 discharged. The city would still maintain that the claim was
21 released under the release provision but not under the
22 discharge provision.

23 THE COURT: Okay. So then back to your argument
24 about why you contend it was a claim that arose before the
25 petition date. I think you were going to argue about the

1 fair contemplation test and how it applies here.

2 MR. SWANSON: Yes, your Honor. The city went into
3 great detail in its motion about the policies the city had in
4 place and Cook's troubled work history. Cook was an employee
5 that habitually was disciplined and disciplined in writing.
6 The city acted pursuant to its written policy and provided
7 Cook with written notice each time he violated that policy.
8 Your Honor, in effect, we had a three strikes and you're out
9 policy here. Cook was provided notice when he violated it
10 the first time. He was provided notice -- written notice
11 when he violated it the second time, and Cook violated it the
12 third time on the petition date but prior to the time the
13 city filed for bankruptcy.

14 THE COURT: It was the conduct -- the last conduct
15 that he engaged in that was the basis for -- the suspension
16 and discharge that officially became effective later occurred
17 before the petition was filed?

18 MR. SWANSON: That's correct, your Honor.

19 THE COURT: That same day but earlier in the day
20 before, so it's a pre-petition conduct that gave rise to the
21 post-petition suspension and discharge.

22 MR. SWANSON: That's exactly correct, your Honor.

23 THE COURT: And under your view of the law, that's
24 sufficient to bring it within the realm of a pre-petition
25 claim under the fair contemplation test?

1 MR. SWANSON: Yes, yes. The city maintains that it
2 was within Cook's fair contemplation that if he violated the
3 written policy that had been provided to him for the third
4 time that he would be suspended or discharged, and that
5 claim, thus, arose prior to the petition date. Consequently,
6 your Honor, the city asks that this Court order that the
7 grievance proceeding be dismissed with prejudice, the first
8 reason being that the claim, whether it arose before or after
9 the petition date, was encompassed within the release
10 provision of the plan when Cook voted to accept the plan, the
11 second argument being that the claim arose prior to the
12 petition date and was discharged under the discharge
13 provision of the plan. Thank you.

14 THE COURT: Well, what about -- I just want to get
15 your response to the argument made in the brief filed by the
16 SAAA -- I think it's page 8 of their brief, Docket 10217 --
17 where they rely upon this provision in the order confirming
18 plan that they say is an exception that saves Mr. Cook's
19 claim, the exception to discharge and release provisions of
20 the plan. I think, if I've got it right, that's at pages 104
21 to 105 of the confirmation order, Docket Number 8272. Using
22 the page numbers that are in the middle at the bottom of the
23 page, not the PDF page numbers, 104, 105, paragraph Q52
24 there. I think, if I understand correctly, SAAA is arguing,
25 among other things, that Cook's claim falls within this

1 language of paragraph 52 as a claim based on a liability
2 incurred by the city after the petition date in the ordinary
3 course of its operations and says that because it falls
4 within that definition, as paragraph 52 goes on to say, such
5 claims will be paid by the city --

6 MR. SWANSON: Sure.

7 THE COURT: -- without further action by the holders
8 of the claims, et cetera. What's your response? What's the
9 city's response to that argument?

10 MR. SWANSON: Well, one, your Honor, the brief
11 says -- it uses that provision, but the argument is premised
12 on the city having assumed the contract. The brief says the
13 confirmation order generally confirms that the city has
14 assumed all such contracts, and it specifically provides that
15 claims for violations of such contracts, those being the
16 assumed contracts, are not released and may be prosecuted
17 without filing a claim in this court and without seeking the
18 approval of this Court, so how I interpreted that argument
19 was that based on the assumption that the contract was
20 assumed, this provision comes into play. If we knock out the
21 faulty assumption that the contract was not assumed, then I
22 didn't see that the SAA was arguing that this provision would
23 have any impact on that, and further --

24 THE COURT: Well, putting aside the issue of --
25 let's assume you're right, there was no -- the CET was not

1 assumed by the city in the plan -- the confirmed plan or
2 otherwise. Using that assumption, does this paragraph, Q52,
3 in the order confirming plan that's quoted at page 8 of the
4 SAAA's brief apply to Cook's claim?

5 MR. SWANSON: Sure. Well, I guess first we get to
6 the assumption that the claim arose -- this provision only
7 would become operative assuming that Cook's claim arose post-
8 petition, so this provision could only affect the city's --

9 THE COURT: Well, but it says claims based on
10 liabilities incurred by the city after the petition date. Is
11 that something different, incurred by the city -- liability
12 incurred by the city, is that something different than when a
13 claim arose, or you think it's the equivalent and should use
14 the same test? You see what I mean? See what I'm asking?

15 MR. SWANSON: Yeah. I'd not considered the
16 difference between that language.

17 THE COURT: Do you think that language -- that that
18 provision was intended to refer only to claims that arose
19 post-petition?

20 MR. SWANSON: Yeah. "Incurred" seems to me has a
21 more definite meaning than "arose." We talk about when an
22 obligation was incurred, when an obligation became mature,
23 when, you know, the claim was potentially actionable under
24 nonbankruptcy law, but this provision certainly would not
25 come into play if the claim arose prior to the bankruptcy

1 filing. And I don't read anything in the release provision
2 which would somehow allow this provision to override the
3 release that Cook provided to the city when he voted to
4 accept the plan.

5 THE COURT: In other words, the release has no --
6 the release provisions in the confirmed plan, they have no
7 exception language. Is that what you're saying?

8 MR. SWANSON: Yes. Let me read it.

9 THE COURT: Yeah.

10 MR. SWANSON: I guess the only exception language,
11 if you -- I'm looking at the plan, page 52

12 THE COURT: Yes.

13 MR. SWANSON: If you go down to the absolute bottom,
14 provided further that nothing in this section III.D.7.A shall
15 release the city's obligations under the plan --

16 THE COURT: I'm sorry. Where are you in there?

17 MR. SWANSON: I'm at the absolute bottom of page 52
18 of the plan.

19 THE COURT: Yes.

20 MR. SWANSON: Provided further that nothing in this
21 section III.D.7.A shall release, one, the city's obligations
22 under the plan, or, two, any defenses that any party may have
23 against the city, et cetera.

24 THE COURT: Oh, I see. So if the paragraph Q52 at
25 pages 104 to 105 of the order confirming plan did apply to

1 give Cook a right to payment under this language, liability
2 incurred after the petition date in the ordinary course of
3 the city's operations, then this language you just read from
4 in the release paragraph on page 52 of the plan would mean
5 that the release would not apply to that.

6 MR. SWANSON: I wouldn't go that far. I mean if
7 we're talking about a, you know, litigation, you know, the
8 release provision here was meant to address litigation claims
9 just like this. I think that reading, if we included all
10 litigation claims as an obligation under the city under the
11 plan, then that would really gut the entire release that --

12 THE COURT: Well, maybe what -- let me see if I
13 understand what you just said.

14 MR. SWANSON: Yeah.

15 THE COURT: It sounds like what you're saying just
16 now is Q52 of the order confirming plan does not apply to a
17 claim like Cook's, which is a litigation claim, I guess in
18 part because you're saying it arose pre-petition.

19 MR. SWANSON: Yes.

20 THE COURT: But had it arisen post-petition, would
21 Q52 apply to it even though it's a litigation claim, or does
22 that not fall within this phrase "incurred in the ordinary
23 course of the city's operations"? Is it in the ordinary
24 course of the city's operations when they -- if they incur a
25 liability because they wrongfully terminate an employee, for

1 example?

2 MR. SWANSON: Yeah. Well --

3 THE COURT: I assume this phrase, "ordinary course
4 of operation," is not defined anywhere in the plan.

5 MR. SWANSON: I don't believe it's defined anywhere.

6 THE COURT: Yeah. Okay. Go ahead.

7 MR. SWANSON: Okay. That's all I have, your Honor.

8 THE COURT: All right. So then, if I understand it,
9 the city's arguments now are twofold, one -- mainly twofold.
10 One, by signing a ballot and submitting a ballot accepting
11 the plan, Mr. Cook released his -- any claims, including
12 those claims being pursued under this -- in this grievance,
13 whether or not it's a claim that arose pre-petition; right?
14 Now, the second argument is it's a pre-petition claim. It's
15 a claim that arose pre-petition under this fair contemplation
16 test, and, therefore, it's discharged --

17 MR. SWANSON: Correct.

18 THE COURT: -- by the confirmed plan in its
19 discharge language. And this Q52 order confirming plan
20 language, liabilities incurred by the city after the petition
21 date in the ordinary course of its operations, doesn't apply
22 because this claim is a pre-petition claim. It's a claim
23 that arose pre-petition, not after the petition date.

24 MR. SWANSON: Yes.

25 THE COURT: Is that right?

1 MR. SWANSON: That is right.

2 THE COURT: Okay. I think I understand these
3 arguments. Anything else you want to say then?

4 MR. SWANSON: Nothing further, your Honor.

5 THE COURT: Okay. Mr. Washington, what would you
6 like to say?

7 MR. WASHINGTON: Good afternoon, to start. Your
8 Honor, first of all, I'd like to put this in some context.
9 We're here for one union and one individual, but I don't
10 think it takes a great stretch of the imagination to
11 recognize the city has 10,000 or so employees, and from July
12 of 2013 till now those employees have filed I would imagine
13 10,000 grievances about somebody who didn't get vacation or
14 somebody who didn't get their overtime or was passed over,
15 and all of those -- a lot of those depend on what seniority
16 rights that they had accrued over many, many years. And I
17 think there would be an awful lot of people who would be
18 terribly surprised if they were told that, hey, you voted for
19 the plan, and, therefore, you gave up your claim to get your
20 holidays or your overtime or your whatever, and the city put
21 in place these CETs and collective bargaining contracts, but
22 actually once you voted for it, you've given them a license
23 to violate that whenever they want to because they can come
24 to Bankruptcy Court and say, "Hey, you don't have any way to
25 enforce this."

1 And just a couple of points on the waiver argument.
2 And I was actually surprised by the reply brief, and I
3 suppose it's because I do labor law, not bankruptcy, but it's
4 a bedrock principle that a grievance filed by the union is a
5 claim by the union even if it's on behalf of an employee, and
6 I'd cite Vaca v. Sipes, 386 U.S. 171. We can settle that
7 claim. We can pursue it. We, the union, can do that. Mr.
8 Cook can't waive it because we represent everybody, and we
9 can't have people fired or taken out of seniority or
10 anything. It's a union claim, and so --

11 THE COURT: Does Vaca versus Sipes say that, say
12 that --

13 MR. WASHINGTON: Yes, it does.

14 THE COURT: -- an employee cannot waive a grievance
15 that a --

16 MR. WASHINGTON: Yes, it does.

17 THE COURT: -- union files on his behalf?

18 MR. WASHINGTON: It says the grievance belongs to
19 the union, and the union has to represent the person fairly,
20 but it's up to us. I mean we represent --

21 THE COURT: No, no. That wasn't my question. Does
22 Vaca versus Sipes actually talk about the inability of the
23 employee on whose behalf a grievance is filed to waive the
24 grievance?

25 MR. WASHINGTON: Actually, I think it cites earlier

1 cases from like the 1930s which hold that, and I'm going to
2 blank on the name of those cases, but right after the Wagner
3 Act was passed, the Supreme Court held, no, an individual
4 can't waive a union right under a union contract because it
5 affects everybody else. But I also -- the second argument we
6 would make on waiver is that the ballot language says in
7 accord with the plan. The plan makes an exception for
8 grievances or for things that arise in the ordinary course,
9 and we would say that any fair contemplation of this, there's
10 no way those 10,000 people when they voted on this thought
11 they were giving up every grievance they ever filed about
12 holidays or overtime or promotions or whatever else or
13 discipline. And I think, you know, it seems to us that the
14 plan itself, which says claims in the ordinary course will be
15 honored, essentially says to people, okay, we're not talking
16 about that. We're talking about, you know, your claim to get
17 your pension as it used to be or your claim to get your wages
18 as they were before this or those kind -- or any back claims
19 you had before July of 2013. I don't think anybody on either
20 side ever thought that every employee in the city was giving
21 up any claim they had about anything, and, in fact, if you
22 look at this case, we were about ready to sit down with the
23 arbitrator before the city even raised this claim. This case
24 had been pending for a couple years. Nobody interpreted that
25 ballot that way until somebody in an office came up with that

1 argument. And so, anyway, the waiver claim, it seems to us,
2 just doesn't make sense. Logically it doesn't make sense
3 with what the plan says, and it certainly isn't fair, and
4 beyond that, we didn't waive it.

5 Second point I'd make is the city -- on the question
6 of whether we have a contract claim, whether we have a -- you
7 know, whether we're entitled to it, we cited on our brief in
8 page 2 the last executive order that the emergency financial
9 manager or the emergency manager issued, Executive Order 44,
10 and it's quoted, says, "We assume every CET we've ever
11 issued," because Mr. Orr realized that, you know, we've still
12 got grievances coming under these contracts and under these
13 CETs that are in the pipeline somewhere or another. They
14 assumed it, and it's certainly in the ordinary course of
15 business. And I'd say among the provisions in the CET and
16 the later contract, the most important or one of the most
17 important is that you won't get discharged except for just
18 cause, I mean, because otherwise you got nothing. If you can
19 get fired for no reason at all, then you have no job
20 protection. And just by the by, I don't think anybody
21 thought they were voting to waive that to say if I cast a
22 vote for this plan, then you can fire me anytime you want,
23 and I don't have any remedy. Nobody thought that. But I
24 think on the question of -- so I think Mr. Orr definitely
25 assumed the CET, and the grievance was filed by the union on

1 union stationery signed by the union under the CET. And I
2 think the question -- the really key question it seems to us
3 is is it a pre-petition or a post-petition claim, and on that
4 I'm somewhat surprised again that Mr. Swanson said, "Well,
5 you only cited one case, McSherry, out of the Eighth
6 Circuit," and I thought, well, okay. I mean this is --
7 termination claims have come up in many bankruptcies. If you
8 think it's different, really cite some other case, and there
9 is no -- there's nothing that contradicts the principle that
10 a grievance or a claim about a termination accrues when it
11 happens. And I went back after getting his brief and looked
12 and, you know, I guess you call it key cited now the
13 McSherry. There is also a Ninth Circuit decision which holds
14 to the same effect at 229 F.3d 871, and it basically says
15 exactly -- in fact, it's a very interesting case because it
16 involves the County of Orange.

17 THE COURT: What's the name of the case?

18 MR. WASHINGTON: The case is O'Loghlin versus County
19 of Orange, 229 F.2d -- F.3d -- I'm sorry -- 871, and
20 basically says if you've -- in that case, it was an employee
21 who had had a physical disability which arose pre-petition,
22 and then after the petition she said, "Look, I need some kind
23 of accommodation for my job because I can't do it as I used
24 to." And they said -- the county in that case said, "Well,
25 but you hurt yourself a couple years ago. You had discipline

1 a couple years" -- whatever, and they said, "Well, no, it's
2 when the accommodation request comes up is the date of the
3 claim. And in that particular case, they found, well, okay,
4 there are two of the three things that were at issue which
5 were before the confirmation date, one afterwards, and so the
6 Ninth Circuit said you can go on one-third of your case but
7 not on the other part.

8 In this case, if you applied those principles here,
9 the discharge occurred, if I recall correctly -- suspension
10 July 26, discharge 8-22. That's when the city took action,
11 and it's what our grievance is filed against. And, you know,
12 the claim arose on those two dates, both of which are after
13 the petition. And if they hadn't done that, we had no
14 grievance because whatever happened or didn't happen on July
15 13th -- and actually I think some of the events supposedly
16 happened before the actual firing and some after. There's a
17 kind of straddle on the events. But I don't think that's
18 relevant. It seems to us that -- and this is what both
19 County of Orange and McSherry say, and I think rightly, is
20 that it arises at the time of the termination. And it seems
21 to us these are different than the cases -- the Grossman's
22 line of cases where it's -- you know, where an asbestos
23 company does something, causes somebody injury, and then they
24 find out about it many years later and bring a lawsuit, and
25 they say, "Well, no, it goes back, you know, under the

1 claim," because the statutory definition of "claim" -- and
2 I'm not a bankruptcy person, as you know, but the statutory
3 is an unsecured liability or an unliquidated claim. Well,
4 the truth is before July 13th -- before July 26 we had no
5 claim. There was no claim at all because there's nothing --
6 until they suspend and terminate him, there's nothing to
7 fight about, nothing to sue about, nothing to do anything.
8 And so before and on July 13th there was no claim within the
9 meaning of the federal bankruptcy petition as well as within
10 the meaning of state law and federal law, too, so that --

11 THE COURT: I assume that part of your argument
12 would be that even though the conduct -- the last conduct by
13 Mr. Cook that gave rise to or --

14 MR. WASHINGTON: Right.

15 THE COURT: -- upon which his suspension and
16 discharge were based, even though that conduct occurred
17 before the petition was filed --

18 MR. WASHINGTON: Right.

19 THE COURT: -- it was -- the city didn't have to
20 discipline him --

21 MR. WASHINGTON: Exactly.

22 THE COURT: -- didn't have to suspend him or
23 discharge him. It could have chosen not to do that.

24 MR. WASHINGTON: That's true.

25 THE COURT: And I think the city's argument is,

1 well, you know, Mr. Cook knew what was going to happen. As
2 soon as he engaged in this conduct for this third time or
3 whatever it was, he knew what was going to happen, but your
4 point -- counterpoint is you don't know till it actually
5 happens because --

6 MR. WASHINGTON: True.

7 THE COURT: -- the city didn't have to do that.

8 MR. WASHINGTON: I think that's exactly right, and,
9 of course, it all assumes that he did it, which is why we
10 have an arbitration to begin with is did he actually do what
11 they said he did, which we would --

12 THE COURT: Right. We're assuming that for purposes
13 of this -- discussing this issue at this point.

14 MR. WASHINGTON: Yeah, although I'm not sure we can
15 because in some sense the question is did anything happen,
16 and that seems to us what an arbitrator has to decide. I
17 mean there may be that nothing happened on the 13th. The
18 only thing we know here for sure is that on the 26th they
19 suspended him, and on the -- what is it? The 26th they
20 suspended him, and August 22nd they discharged him. That's
21 when under the bankruptcy definition a claim arose because
22 before that nothing had happened that gave Mr. Cook, the
23 Senior Accountants, or anybody else a claim. And so on both
24 reasons, it seems to me we really should let Mr. Barnes, the
25 arbitrator, sort this all out and do whatever -- he can find

1 out whether Mr. Cook is the bad guy they said he is or the
2 good guy we say he is, so I mean that's kind of the way we
3 see it. I'd be happy to answer any questions that you might
4 have.

5 THE COURT: Is there any other authority you want to
6 cite to me for this proposition that the employee, Mr. Cook,
7 could not waive the grievance filed by his union?

8 MR. WASHINGTON: And if I could remember the name of
9 the case, I would. I'd be happy to give you that cite, but
10 to be truthful, your Honor, from a labor law point of view,
11 it's such a bedrock principle that it's like almost the first
12 commandment to us. But I can certainly provide a cite.

13 THE COURT: Yeah. I mean have lawyers -- and this
14 isn't you, but --

15 MR. WASHINGTON: Yeah.

16 THE COURT: -- I have lawyers that come in here and
17 say, "I've been practicing law for 30 years, and everybody
18 knows such-and-so" --

19 MR. WASHINGTON: I understand that.

20 THE COURT: -- some principle of bankruptcy law
21 that -- well, what's the authority? There isn't any. You
22 can try to find it. There isn't any. It's just wrong. I
23 mean this has happened to me.

24 MR. WASHINGTON: I understand that.

25 THE COURT: And I'm not accusing you.

1 MR. WASHINGTON: Yeah. I understand.

2 THE COURT: I'm just saying, you know, I got to have
3 something to go on here. I'll certainly review Vaca versus
4 Sipes, but if there's anything else you want to cite to me on
5 that, I'd like to know it.

6 MR. WASHINGTON: And I would be happy to do that.
7 Can I send a letter or a supplemental, something like that?
8 I'd have to do it by paper as we --

9 THE COURT: Just file a supplemental brief. You're
10 still filing by paper?

11 MR. WASHINGTON: Yeah.

12 THE COURT: I'll allow you to do that. We'll come
13 back to a deadline for that because I want to give the city
14 an opportunity also to brief that if they want to.

15 MR. WASHINGTON: Okay. Fine. That would be fine.

16 THE COURT: Anything else you want to say?

17 MR. WASHINGTON: No. I think we've said what it is.
18 I do think there'd be an awful lot of people surprised if
19 they found out that they had -- their vote suddenly meant
20 they didn't get -- their grievance on Thanksgiving holiday
21 was gone or whatever.

22 THE COURT: All right.

23 MR. WASHINGTON: Thank you very much.

24 THE COURT: Thank you. Mr. Swanson, as counsel for
25 the moving party, I'll give you an opportunity to reply

1 briefly if you want to.

2 MR. SWANSON: Sure, your Honor. Just two points
3 here. First, Mr. Washington referred to this emergency
4 manager order that was attached as an exhibit to his brief.
5 That emergency manager order is dated December 8th, 2014.
6 Mr. Washington claims it stands -- some of the language in
7 there caused the city to assume the CET. The language I'd
8 like to point the Court to is cited in the brief. "The EM
9 also ratifies and approves the CETs that were implemented
10 prior to the EM tenure and that remain in effect as of the
11 date of this order." The union stated in its brief that the
12 CET was not in effect as of December 8th, 2014, so I don't --
13 I think it's legally wrong that the order --

14 THE COURT: This is the quotation now that you have
15 on page 2 of your reply brief it looks like; right?

16 MR. SWANSON: Yes, yes, yeah, yeah, yeah.

17 THE COURT: Oh, wait.

18 MR. SWANSON: Well --

19 THE COURT: No. The emergency manager order, you
20 don't quote that in your brief?

21 MR. SWANSON: I don't quote that.

22 THE COURT: I see. Okay.

23 MR. SWANSON: The union quotes it on page 2 of its
24 brief.

25 THE COURT: Oh, I see. Hold on a minute. Where

1 does the CET that's involved in this case fall in this
2 quotation?

3 MR. SWANSON: It's not encompassed within that
4 quotation because it was not in effect at the time of the
5 order. The order was dated December 8, 2014. The CET was
6 not in effect in July of -- after July of 2014.

7 THE COURT: Well, it says -- second sentence of the
8 quotation in the brief of the union, at least, says, "All
9 city employment terms, CETs, are hereby adopted, ratified,
10 and approved in all respects," et cetera. You think that
11 refers only to CETs that were then in effect?

12 MR. SWANSON: Yes, your Honor.

13 THE COURT: And I assume they're not -- that this
14 one is not listed on the attached Exhibit C to that order. I
15 didn't look to see, but --

16 MR. SWANSON: There was no Exhibit C attached to the
17 order that was included within the movant's brief. I didn't
18 independently look to see if there was an Exhibit C, but I
19 assume if it had been listed there, the union would have
20 included it.

21 THE COURT: All right. Go on. What else did you
22 want to say?

23 MR. SWANSON: Just I wanted to touch briefly again
24 on when this claim arose. The union cites to McSherry. The
25 city does not believe that McSherry is applicable because the

1 quoted portion about when the claim arose was in response to
2 the Frenville approach. This was another case which was
3 discussing the accrual approach. When the claim became
4 actionable under state law is not the test for bankruptcy.
5 If the claim didn't become actionable until July 26th or
6 whatever other date the union alleges, that's not the test.
7 The test that this Court needs to focus on is whether the
8 claim was within Cook's fair contemplation as of the petition
9 date, and that is an entirely separate question from when the
10 claim became actionable under state law. Thank you.

11 THE COURT: Was there anything else?

12 MR. SWANSON: No, your Honor.

13 THE COURT: All right. Thank you both. Mr.
14 Washington, as we said, I'll give you an opportunity to file
15 a brief -- a short supplemental brief regarding this issue
16 that I raised or asked further about regarding the -- what
17 you say is the legal inability of an employee to waive a
18 claim that a union has brought as a grievance on his behalf.
19 How much time do you want? Is seven days enough time for you
20 to file it?

21 MR. WASHINGTON: That would be fine, your Honor,
22 yeah.

23 THE COURT: I don't want a big long brief. I want
24 a --

25 MR. WASHINGTON: Oh, and it won't be.

1 THE COURT: Two pages enough?

2 MR. WASHINGTON: Two pages is fine.

3 THE COURT: All right. Two pages, seven days, and
4 I'll enter a short order that permits that, sets a deadline,
5 and which says right in the order that you are permitted to
6 file that in paper form.

7 MR. WASHINGTON: Thank you.

8 THE COURT: You still -- you're not -- you're still
9 not filing electronically?

10 MR. WASHINGTON: No, because I'm --

11 THE COURT: Okay.

12 MR. WASHINGTON: -- not a bankruptcy -- I don't tend
13 to do much bankruptcy, frankly.

14 THE COURT: All right. Mr. Swanson, I'll give you
15 an optional opportunity to file a response to that. Unless
16 you want to waive that now, I'll give you that option and set
17 a deadline. What do you want to do?

18 MR. SWANSON: No, your Honor. We would like that
19 option.

20 THE COURT: Okay. Seven days after the union's
21 brief is enough time, I assume?

22 MR. SWANSON: Yes, your Honor.

23 THE COURT: Okay. So the union's deadline will be
24 December 9, one week from today, City's response will be
25 December 16, each brief not to exceed two pages. When that

1 December 16 date has passed, I will consider this motion to
2 be taken under advisement at that point. I'll certainly
3 review that. I do want to take some additional time, in any
4 event, to think some more about the issues and the arguments
5 made in both the writings and in the oral argument and will
6 consider the supplemental briefs. I anticipate issuing a
7 written decision on this, hopefully not a very long one,
8 sometime before the end of December, this month.

9 Mr. Washington, you may be aware -- I don't know if
10 you are or not, but I'll just, just so you're aware of this,
11 let you know that I have a couple of other matters -- motion
12 matters that I have heard previously in the City of Detroit
13 case that concern in part this issue of when did a claim
14 arise, did it arise pre-petition or post-petition, that I
15 have to decide, and I'm going to issue a written opinion on
16 that -- on those matters, probably one opinion for both of
17 those matters, and I'll probably do that very close to the
18 same time that I issue the decision in this matter, maybe
19 sooner since this one has to wait until the parties file
20 their supplemental briefs. So this is not the first time
21 that issue has come up, although I haven't ruled on it yet in
22 any of these matters, so you'll see that, you know, if you
23 care to see it, the opinion that comes out on that on these
24 other matters as well, so all right. So anything else today
25 then?

1 MR. WASHINGTON: Nothing, your Honor. Thank you.

2 MR. SWANSON: Nothing, your Honor.

3 THE COURT: All right. Thank you both, and thank
4 you for your efforts and for your oral argument.

5 THE CLERK: All rise. Court is adjourned.

6 (Proceedings concluded at 2:20 p.m.)

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

December 9, 2015

Lois Garrett